

No. 06-1076

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES A. KAY, JR.,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The parties appearing before this Court are Petitioner James A. Kay, Jr. in his personal capacity, Respondent the Federal Communications Commission, and Respondent the United States. Also appearing are Intervenor Sprint Corporation and Southern Communications, Inc.

2. Rulings under review.

The *Orders* under review are Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969 (2004) (*Public Safety Order*); Memorandum Opinion and Order, *Improving Public Safety Communications in the 800 MHz Band*, 20 FCC Rcd 16015 (2005) (*Reconsideration Order*). We refer to these collectively as the *Orders*.

3. Related cases.

This Court previously upheld aspects of the *Public Safety Order* in *Mobile Relay Associates v. FCC*, 457 F.3d 1 (D.C. Cir. 2006) and *Sprint Nextel Corp. v. FCC*, 524 F.3d 253 (D.C. Cir. 2008). Respondents are aware of no related cases still pending, though a number of cases previously consolidated with this one have since been dismissed. *See* Case Nos. 06-1079, 06-1082, 07-1218, 07-1332, and 07-1367.

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GLOSSARY

800 MHz Band	the band of frequencies in the electromagnetic spectrum extending from 806-824 MHz and from 851-869 MHz
Cellular A/B Band	the band of frequencies in the electromagnetic spectrum extending from 824-849 MHz and from 869-894 MHz, used for cellular phone service
CMRS	<i>Commercial Mobile Radio Service</i> , essentially cellular telephone service
GHz	<i>gigahertz</i> , a measure of frequency equal to one billion Hertz
ESMR	<i>Enhanced Specialized Mobile Radio</i> , the technology primarily used by Sprint Corp. (formerly Nextel) in the 800 MHz band
MHz	<i>megahertz</i> , a measure of frequency equal to one million Hertz
NPSPAC	<i>National Public Safety Planning Advisory Committee</i> , the committee that advised the Commission on rules for the public-safety “NPSPAC Band”
NPSPAC Band	frequency band dedicated to use by public safety licensees, currently extending from 806-809 MHz and from 851-854 MHz
SMR	<i>Specialized Mobile Radio</i> , the FCC’s designation of a radio service that provides dispatch communications in the 800 megahertz band

JURISDICTION

The Court has jurisdiction over FCC rulemaking orders under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), but, as explained below, the court lacks jurisdiction here because petitioner has not shown standing.

QUESTIONS PRESENTED

In 2004, the FCC reconfigured spectrum in the “800 MHz band” to abate radio interference that beset public safety licensees, such as police and firefighters, resulting from the operations of cellular providers with nearby spectrum allocations. Under the new plan, a spectrum block allocated solely to public-safety use was moved to the bottom of the 800 MHz band. To make room for this move, incumbent licensees, such as then-licensee Petitioner Kay, were to be moved to new locations and compensated financially for that move. Kay’s petition for review presents the following questions for review:

1. Whether Kay has standing to sue in his personal capacity, given that he does not hold any affected licenses and has not shown an injury separate from any allegedly suffered by his company, Third District.
2. Whether the FCC’s decision to move licensees such as Kay in order to make room for the public-safety “NPSPAC” band is supported by substantial evidence.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Petitioner.

COUNTERSTATEMENT

A. Public-safety allocations in the 800 MHz band.

The Communications Act gives the Commission “comprehensive powers” to regulate radio communications. *Nat’l Broad. Co. v. FCC*, 319 U.S. 190, 217 (1943). Among these powers, the Commission has authority to “[a]ssign bands of frequencies to the various classes of stations,” 47 U.S.C. § 303(c), to adopt rules the agency deems necessary “to prevent interference between stations,” 47 U.S.C. § 303(f), and to assign and modify station licenses, 47 U.S.C. §§ 308-309, 316.

Section 1 of the Act directs the Commission to exercise these powers “for the purpose of promoting safety of life and property through the use of wire and radio communications.” 47 U.S.C. § 151. Section 332(a) of the Act likewise directs the Commission, “[i]n taking actions to manage the spectrum,” to “promote the safety of life and property.” 47 U.S.C. § 332(a). Pursuant to this authority, since the 1970s the FCC has licensed spectrum in the 800 MHz band for use by public safety officials, such as police and fire

departments, medical rescuers, and other emergency personnel.¹ These entities use the spectrum primarily for two-way communication, such as between a dispatcher and a police car or ambulance.

In the 1980s, Congress further directed the FCC to establish a plan to ensure that the communications needs of state and local public safety authorities would be met. *See* Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 9(a), 97 Stat. 1467 (1983). In doing so, the agency was to “consider the need for a nationwide contiguous frequency allocation for public safety purposes.” *Id.* After a rulemaking confirmed the need for spectrum in the 800 MHz band dedicated solely to public safety, the agency allocated 6 MHz of spectrum to this use at 821-824/866-869 MHz. *See Amendment of Parts 2 and 22 of the Commission’s Rules Relative to Cellular Communications Systems*, 2 FCC Rcd 1825, 1836 ¶¶99 (1986) (*NPSPAC Allocation Order*). The agency also established the National Public Safety Planning Advisory Committee (NPSPAC) to propose rules for use of the allocated spectrum. *Development and Implementation of a Public Safety National Plan and Amendment of Part*

¹ “800 MHz band” refers to the spectrum located between 806 and 824 MHz and between 851 and 869 MHz. The frequencies are assigned and referred to in pairs; the lower set of frequencies is used for transmission from mobile handsets to base stations, and the higher set for transmissions in the opposite direction.

90 to Establish Rules and Technical Standards for Use of the 821-824/866-869 MHz Bands by the Public Safety Services, 3 FCC Rcd 905 (1987) (*NPSPAC Rules Order*). This allocated spectrum is therefore known as the NPSPAC band. Notice of Proposed Rulemaking, *Improving Public Safety Communications in the 800 MHz Band*, 17 FCC Rcd 4873, 4877 ¶8 (2002) (JA___) (*Public Safety NPRM*).

B. Interference in the 800 MHz band

Throughout this period, the Commission had also licensed 800 MHz band frequencies outside of the NPSPAC band for private purposes, such as internal company communications; management of railroads, utilities, pipelines and other facilities (referred to as “critical infrastructure industries”); and a commercial application called “specialized mobile radio” (SMR), used, for example, by taxi dispatch services. The agency also allocated some spectrum outside the NPSPAC block to public safety users. The technology of the 1970s did not accommodate the use of contiguous spectrum by a single system, so the Commission did not make separate blocks of spectrum available to each type of user. Instead, a large part of the 800 MHz band was “interleaved,” with spectrum allocations for many types of users mixed side-by-side. *See Public Safety NPRM* ¶7 (JA ___).

By the early 1990s, licensees used two distinct types of technology in the 800 MHz band. The traditional architecture of an 800 MHz system, employed by most public safety systems as well as many private ones, consists of a single antenna, ordinarily situated at a high elevation, that provides a signal to a relatively large, roughly circular, area with the transmitting antenna in the center. *Id.* ¶10 (JA ____). Because of the typical antenna siting, the systems are called “high-site” systems.

Other licensees later developed systems based on cellular technology. This included “enhanced specialized mobile radio” (ESMR, pronounced “easemer”) systems in the “interleaved” portion of the 800 MHz band (then located immediately below the NPSPAC band), as well as “traditional” cellular systems in the “cellular A/B band” outside the 800 MHz band but immediately above the NPSPAC band.² ESMR systems use the same system architecture as “traditional” cellular telephone systems, though with a distinct technology. *Public Safety Order* n.6 (JA ____). In both types of system, the service area is divided into small “low-site” multi-channel cells, each of

² As shown in the diagram below at p. 9, the cellular A/B band uses the frequencies 824-849/869-894 MHz. The term “800 MHz band” refers to spectrum at 806-824/851-869 MHz, thus excluding the cellular A/B band, despite the cellular A/B band’s actual frequency. The 800 MHz reconfiguration at issue in this case did not involve changes to the cellular A/B band.

which operates at lower power than a traditional high-site system, using a lower antenna elevation. *Id.* Cellular system architecture can support many more customers than a high-site system and makes it feasible to provide commercial mobile radio service (CMRS) that is connected to the wireline telephone network. *Public Safety NPRM* at ¶¶11-13 (JA __-__); 47 U.S.C. § 332(d)(1) (defining “commercial mobile service”). At the time of the *Orders* under review, Intervenor Sprint/Nextel³ was the nation’s primary ESMR provider and competed with wireless telephone carriers such as Verizon Wireless.

As use of 800 MHz spectrum by both public safety and private users increased, so did problems of interference to the operation of high-site systems, particularly public safety systems, caused by ESMR and other cellular systems. *Public Safety Order* ¶2 (JA __). By 2002, the FCC had received reports of interference with public safety communications caused by ESMR and cellular operators in at least 25 cities throughout the country. *Public Safety NPRM* ¶14 (JA __). Interference to public safety systems became particularly problematic in the wake of increasingly complex public safety and homeland security needs after the September 11, 2001 terrorist

³ The company was known originally as Nextel, then Sprint/Nextel at the time of the *Public Safety Order*, and is now known as Sprint. The names are used interchangeably in this brief.

attacks. *Public Safety NPRM* ¶17 (JA ____). By the time of the *Public Safety Order* in 2004, usage of high-site and cellular systems on adjacent spectrum had become “fundamentally incompatible,” *Public Safety Order* ¶2 (JA ____).

C. *The Public Safety Order.*

In the 2002 *Public Safety NPRM*, the FCC began a rulemaking on how to remedy the interference problems. The complexity of the issue led to a very extensive record, with multiple rounds of notice-and-comment, and more than 2200 comments containing engineering, economic, legal, and policy analyses. *Public Safety Order* ¶61 (JA ____).

A coalition comprising Nextel, many public safety organizations, and a number of private wireless groups (the “Consensus Parties”) proposed a reconfiguration of the 800 MHz band, segregating traditional high-site systems and cellular ESMR systems into two separate blocks of spectrum. *Id.* ¶¶4, 15 (JA __, __). This “Consensus Proposal” ultimately became a general template for the Commission’s restructuring plan.

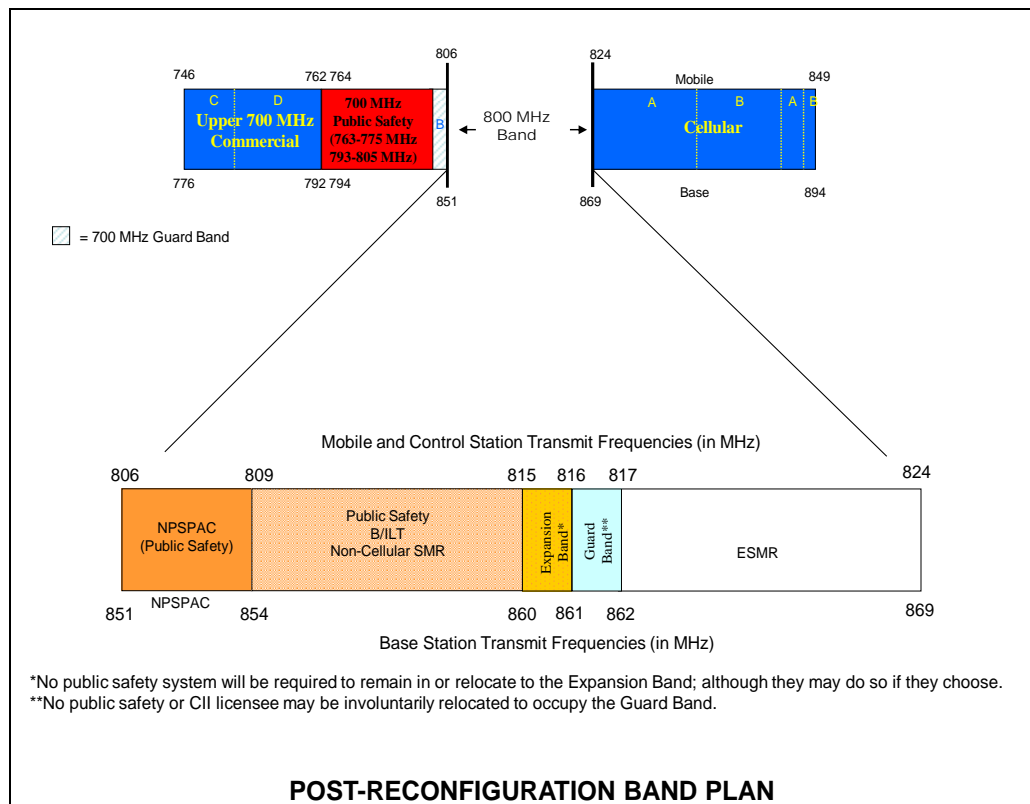
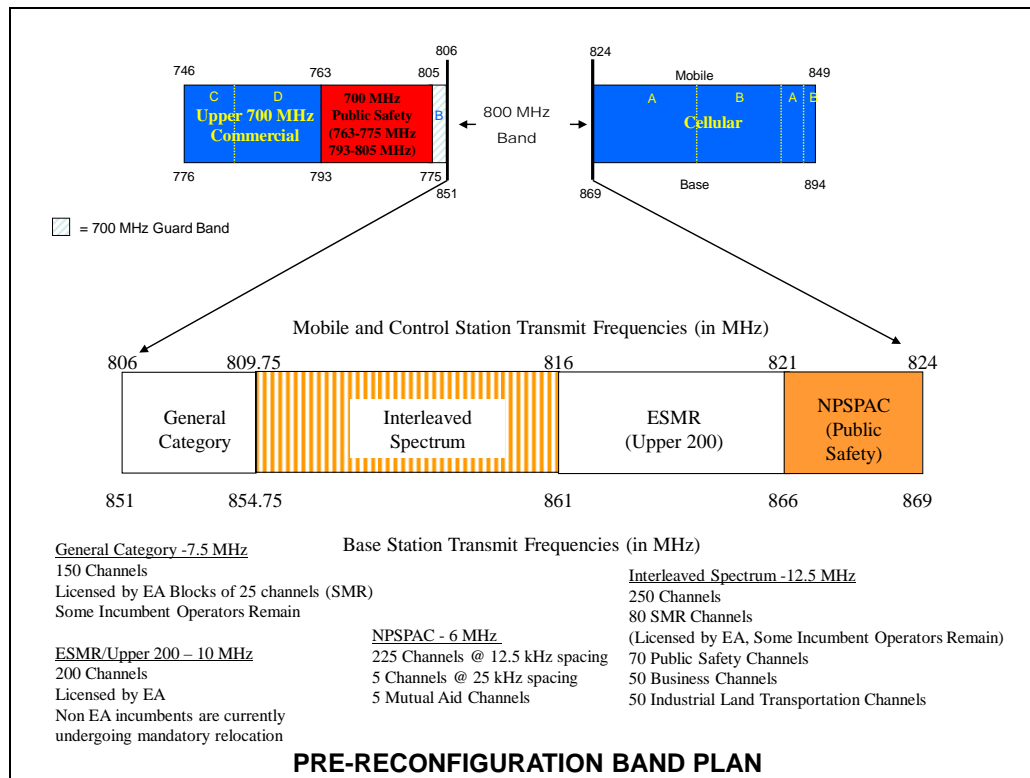
Recognizing that the “root cause” of the interference was the mixture in the band of “generally incompatible” high-site and cellular technologies, *Id.* ¶3 (JA ____), the Commission reconfigured the 800 MHz band to segregate cellular operations and high-site public safety and private operations. The Commission was “guided by the principle that we can minimize unacceptable

interference in the 800 MHz band by placing similar system architectures in like spectrum and isolating dissimilar architectures from one another.” *Id.*

¶22 (JA ____).

1. The new plan.

The Commission divided the 800 MHz band into five segments, each dedicated to a specific type of use, as described below. The following diagrams from the *Public Safety Order* ¶¶21-22 (JA ____) show the band plans before and after the reconfiguration.



*No public safety system will be required to remain in or relocate to the Expansion Band; although they may do so if they choose.

**No public safety or CII licensee may be involuntarily relocated to occupy the Guard Band.

- **The NPSPAC Block**—At the lower end of the 800 MHz band, the Commission reserved 6 MHz of spectrum for the exclusive use of public safety radio communication systems in the “NPSPAC block” to replace the 6 MHz previously dedicated to this use. Under the prior scheme, the NPSPAC block had been sandwiched between Sprint’s ESMR operations below and the cellular A/B block above, resulting in interference. *Public Safety Order* ¶2 (JA ____). The new plan would remedy this problem by moving the NPSPAC block to the bottom of the 800 MHz band. Thus all public safety licensees in the former NPSPAC band would be moved into the new NPSPAC public safety block at 806-809/851-854 MHz. *Id.* ¶151 (JA ____). All private high-site users already located in that spectrum—such as then-licensee Kay—were required to relocate to new spectrum in the interleaved band. *Id.* ¶153 (JA ____).
- **The Interleaved Block**— Directly above the NPSPAC block, the Commission retained an “interleaved” band segment (809-815/854-860 MHz) for use by both public safety and private high-site systems. *Public Safety Order* ¶154 (JA ____). Private high-site users in what would become the new NPSPAC band would be relocated here. *Id.* ¶153 (JA ____).

- **The Expansion And Guard Bands**—Directly above the interleaved block, the Commission provided for an “expansion band” (815-816/860-861 MHz) and a “guard band” (816-817/861-862 MHz) to provide additional spectral separation between ESMR users and public safety users. *Public Safety Order* ¶¶154-158 (JA __-__).
- **The ESMR Band**—At the upper end of the 800 MHz band—at the opposite end of the band from the new NPSPAC band—the Commission created an ESMR band (817-824/862-869 MHz). Most ESMR systems, including Nextel, were required to migrate to the ESMR band.⁴ *Public Safety Order* ¶¶172-173 (JA __-__).

2. Relocation of existing licensees.

To minimize disruption, the Commission specified that all relocating licensees would be moved to comparable facilities that “will provide the same level of service as the incumbent’s existing facilities, with transition to the new facilities as transparent as possible to the end user.” *Public Safety Order* ¶201 (JA __). The Commission further pledged that band reconfiguration would not degrade existing service or adversely affect public safety

⁴ ESMR systems (other than so-called “high density systems,” like Nextel’s) may operate in the interleaved, expansion, and guard bands, but they are subject to strict interference guidelines and must coordinate any changes in their system with other nearby spectrum users. *Id.* ¶162 (JA __-__).

communications and operations. *Id.* ¶26 (JA ____). The details of the relocation process would be handled by a Transition Administrator reporting to the Commission. *Id.* ¶¶190-200 (JA ____-____).

Critically, the Commission's plan also compensated licensees for the financial cost of relocations, such as new equipment or retuning existing equipment. To fund the moves, the Commission required Nextel (which agreed) to fund "the full cost of relocation of all 800 MHz band public safety systems and other 800 MHz band incumbents to their new spectrum assignments with comparable facilities." *Id.* ¶11 (JA ____). Nextel secured payment with a \$2.5 billion letter of credit. *Id.* ¶182 (JA ____). The Commission in turn licensed additional spectrum in the 1.9 GHz band to Nextel. *Public Safety Order* ¶¶5, 12 (JA ____,____).⁵

D. Order on Reconsideration.

A number of parties petitioned the FCC for clarification or reconsideration of the *Public Safety Order*. Kay asked the Commission to reconsider the award of 1.9 GHz spectrum to Nextel. *Kay Reconsideration*

⁵ The 1.9 GHz band is elsewhere in the spectrum, not depicted in the diagrams on p. 9. To guard against a windfall for Nextel, if the value of this replacement spectrum exceeds Nextel's reimbursement costs, Nextel must pay the difference to the Treasury. *Public Safety Order* ¶¶11-12, 321 (JA ____-____, ____). Because the rebanding is not complete, there has not yet been a final accounting of these costs.

Petition at 2–3, 5–10 (JA ____). He also argued that the mandatory relocation of high-site users like himself, who were not themselves causing interference to public safety licensees, was “inequitable” and “of highly questionable legality.” *Id.* at 4 (JA ____). Kay did not, however, propose an alternate plan that would secure a safe location for the NPSPAC public-safety band without relocating private high-site users.

The FCC responded to Kay’s petition (and many others) in the *Reconsideration Order*.⁶ The agency disagreed with Kay’s claim that “the primary, if not sole, source of unresolved interference is the incompatibility of Nextel’s...ESMR operations...with the more traditional ‘high site’ systems prevalent in the band.” *Kay Reconsideration Petition* at 2 (JA ____). Instead, the Commission found that “[a]lthough Nextel has been implicated in interference incidents, the record reflects that the interference problem...is highly complex and has not been ‘caused’ by any single party,” but rather was the result of “systems with incompatible technologies operat[ing] in spectral proximity to one another.” *Reconsideration Order* ¶66 (JA ____).

In particular, the FCC cited to its findings in the original order that the proximity of “Nextel, cellular, [and] public safety” users caused the

⁶ Although this was the third reconsideration order in this proceeding, it is the only one relevant here, and so we call it the *Reconsideration Order*.

interference “even though all parties are operating in compliance with Commission rules.” *Public Safety Order* ¶300 (JA __); *see Reconsideration Order* ¶66 & nn.165-166 (JA __) (citing *Public Safety Order* ¶¶115-123, 300). For example, Kay’s assertions that Nextel’s operations were the sole cause of interference did not take account of inference from traditional cellular operations in the cellular A/B band immediately above the NPSPAC band. *See Public Safety Order* ¶115 (JA __) (“unacceptable interference can originate from...ESMR, cellular telephone, or both). The agency therefore “continue[d] to believe that the only feasible means to protect public safety licensees from unacceptable interference, now and in the future, is the spectral separation the Commission achieved in relocating public safety channels as far in frequency as possible from ESMR and cellular telephone operations.” *Reconsideration Order* ¶66 (JA __).

E. Petitions for Review

Kay petitioned for judicial review in February 2006, and his suit was consolidated with several others. On August 2, 2006, this Court put these cases in abeyance pending the FCC’s disposition of multiple petitions for administrative reconsideration.⁷ All cases aside from Kay’s have since been

⁷ Three additional cases were filed in 2007, after the FCC released the *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007). They were also consolidated and held in abeyance.

dismissed, voluntarily or by the Court. *See* Case Nos. 06-1079, 06-1082, 07-1218, 07-1332, and 07-1367.

Two other suits challenging the 800 MHz reconfiguration plan moved forward. In *Mobile Relay Associates v. FCC*, 457 F.3d 1, 3 (D.C. Cir. 2006), this Court denied petitions for review by two private high-site licensees who complained that the FCC was arbitrary in excluding them from the new ESMR band. The Court held that the agency had “adequately explained its rationale” for this scheme: “high site systems like those operated by [petitioners], as well as by public safety entities, suffered from interference due to the cellular architecture of licensees like Nextel....” *Id.* at 9-10. The agency’s different treatment of these two categories was thus “eminently reasonable.” *Id.* at 10. And in *Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 258 (D.C. Cir. 2008), this Court upheld the FCC’s determination that Nextel had to vacate certain frequencies, even if the frequencies to which it would move were not yet available.

The FCC moved to dismiss Kay’s review petition on June 14, 2014, based on lack of standing. The Court deferred ruling on that motion and directed the litigants to address Kay’s standing in their merits briefs. *See Per Curium Order*, Document No. 1518321 (Oct. 21, 2014).

F. James A. Kay licenses and Third District licenses.

Petitioner James A. Kay held licenses in the 800 MHz band in the Los Angeles area starting in the early 1980s. *Kay v. FCC*, 396 F.3d 1184, 1185 (D.C. Cir. 2005). Though he provided this service through a sole proprietorship, Lucky's Two-Way Radio, he held the licenses in his personal capacity. *Id.*

In 2002, the FCC revoked Kay's 800 MHz licenses after finding that he had participated in the unlawful transfer of control of certain 800 MHz licenses and lacked candor in his submissions to the Commission. *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002). This Court affirmed that decision. *Kay*, 396 F.3d 1184.

Kay then asked the FCC to rescind the revocation order and restore his 800 MHz licenses, offering to give up other licenses and pay a fine in exchange. The FCC denied his request on April 12, 2010, and ordered Kay to cease operation no later than 11 days after release of its decision. *See James A. Kay, Jr. and Marc Sobel*, Memorandum Opinion and Order, 25 FCC Rcd 4068 (2010), *recon. dismissed*, Report and Order, 25 FCC Rcd 7639 (2010), *appeal dismissed*, *Kay v. FCC*, 2010 WL 4340464 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2913 (2011). On April 23, 2010, the FCC's subordinate Wireless Telecommunications Bureau performed the administrative task of

updating the agency's Universal Licensing System to reflect the cancellation of Kay's 800 MHz licenses. *Id.*

Kay thus holds no licenses in his personal capacity. He does allege that he is the sole owner of Third District Enterprises, LLC (Kay Br. 12-13), which holds a number of licenses in the 800 MHz band in Southern California. The 800 MHz band in this area has not yet been fully reconfigured because the United States must coordinate spectrum allocation with Mexico, an ongoing process. Third District's licenses are in the area of the band to which the NPSPAC band will be moved, thus requiring relocation. *See* Letter from Russell H. Fox, Counsel for Third District to Marlene Dortch, Secretary, FCC at 2 (Nov. 7, 2014) (Supp. App. 2) (*November 2014 Third District Letter*).

G. Status of rebanding.

In most of the country, reconfiguration of the 800 MHz band is nearly complete. As of late 2014, parties have negotiated 98.4% of the necessary agreements and retuned or replaced over 1.5 million radios—92.2% of the necessary total. *See 800 MHz Transition Administrator, LLC Quarterly Progress Report* at 1 (Dec 29, 2014) (Supp. App. 6, 10). Sprint reports that it has spent almost \$1.8 billion dollars in reimbursement costs. *Id.* at 25 (Supp. App. 34).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction because Kay has not demonstrated standing. He holds no 800 MHz licenses himself, and while he claims to be the indirect but controlling shareholder of Third District, the shareholder standing rule requires him to show an injury to himself separate from any injury to his company. He has not even attempted to do so. The case should therefore be dismissed for lack of jurisdiction.

Even if Kay had standing, he has not met his high burden to show that the *Orders* are unsupported by substantial evidence, much less that he is entitled to the drastic relief of unwinding the nearly complete effort of reconfiguration, which has lasted over 10 years and already cost over \$1.8 billion. In the *Orders* on review, the agency reconfigured the 800 MHz band to abate interference that hampered the communications of public safety first responders. Based on an extensive record, the FCC found it necessary to “spectrally segregate” public safety systems from the cellular telephone systems that were causing interference. *Public Safety Order* ¶22 (JA ____). In order to do this, it was necessary to move incumbent high-site users like Kay, who occupied what would become the new NPSPAC public-safety band. To be sure, Kay is right that operations like Third District’s were not causing interference under the old scheme. But that is not why those licensees were

moved. They were moved to make room for the NPSPAC band dedicated to public safety. The record amply supports the FCC's decision that band reconfiguration was "the only feasible means to protect public safety licensees from unacceptable interference" *Reconsideration Order* ¶66 (JA ____). Like other aspects of the *Orders* that this Court has already upheld, this decision was "eminently reasonable," *Mobile Relay*, 457 F.3d at 10, and amply supported by substantial evidence.

STANDARD OF REVIEW

Kay argues that the *Orders* are not supported by substantial evidence. Kay Br. 14-17. To meet that standard, the record must contain sufficient support "to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)); *see also Kay*, 396 F.3d at 1188. Thus, even "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620. In matters of spectrum management, the FCC "functions as a policymaker and, inevitably, a seer—roles in which it will be accorded the greatest deference by a reviewing court." *Teledesic LLC v. FCC*, 275 F.3d

75, 84 (D.C. Cir. 2001) (quoting *Telocator Network of Am. v. FCC*, 691 F.2d 525, 538 (D.C. Cir. 1982), quotation marks omitted).

ARGUMENT

I. KAY LACKS STANDING BECAUSE HE HOLDS NO LICENSES IN HIS PERSONAL CAPACITY.

A. Kay is not himself injured.

To invoke the jurisdiction of a federal court, a party must demonstrate standing. Standing involves “both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy the “irreducible constitutional minimum of standing,” a petitioner must show: (1) an injury that is actual or certainly impending (2) that the injury is fairly traceable to the challenged action; and (3) that the injury is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Prudential standing requirements are additional, court-imposed limits on the type of party or action that can invoke the authority of federal courts. *Warth*, 422 U.S. at 499; *see also Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (explaining that the “Court has developed a complementary rule of self-restraint”). One such prudential limitation is that a plaintiff “‘cannot rest his claim to relief on the legal rights or interests of third parties.’” *LaRoque v. Holder*, 650 F.3d 777, 781 (D.C. Cir. 2011) (quoting *Warth*, 422 U.S. at 499).

Instead, a plaintiff must show that “he himself is injured.” *Barrows*, 346 U.S. at 255-56.

It is Kay’s burden to demonstrate standing, *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002), and he must do so in his opening brief, Circuit Rule 28(a)(7). Kay has not demonstrated an injury from the 800 MHz reconfiguration orders because he does not himself hold any 800 MHz licenses. The Commission revoked for misconduct all of the 800 MHz he held directly in 2002, and those revocations became effective in 2010.⁸ *See* above at 16. Because Kay is not injured by the FCC’s efforts to restructure the 800 MHz band, he lacks standing to challenge the FCC orders at issue.

B. Kay has not shown a unique injury as a shareholder.

Kay argues—citing no precedent—that he nevertheless has “sufficient standing to seek judicial review” because he is the “beneficial owner of and the person in 100% control of Third District [Enterprises, LLC],” an entity that holds seventeen 800 MHz licenses. Kay Br. 12-13. But that is not sufficient. Third District is not a petitioner in this matter, *see id.* at i (identifying only Kay as petitioner), and the “longstanding equitable restriction” on shareholder standing “generally prohibits shareholders from

⁸ While Kay likely had standing when he first petitioned for review in 2006, “[a] plaintiff must maintain standing throughout the course of litigation.” *Foretich v. United States*, 351 F.3d 1198, 1210 (D.C. Cir. 2003).

initiating actions to enforce the rights of the corporation.” *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990); *Labovitz v. Washington Times Corp.*, 172 F.3d 897, 905 (D.C. Cir. 1999) (“a stockholder of a corporation has no standing to sue third parties for wrongs inflicted by those third parties upon the business and property interest of the corporation” (internal quotation marks and citation omitted)).⁹ Indeed, this Court has held that “[n]o shareholder— not even a sole shareholder—has standing in the usual case to bring suit in his individual capacity on a claim that belongs to the corporation.” *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984); *see also Termorio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 92 (D.D.C. 2006) *aff’d sub nom. TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007). The shareholder-standing rule serves to preserve the corporate form both when it is convenient for owners, and when it is not. *See Williams v. Mordkofsky*, 901 F.2d 158, 164 (D.C. Cir. 1990) (“Had [the company] declared

⁹ The shareholder-standing rule applies equally to members of limited liability companies. *See, e.g., Orgain v. City of Salisbury*, 521 F. Supp. 2d 465, 476 n.33 (D. Md. 2007) (“Shareholders (or in the case of an LLC, its members) do not have standing to sue on the corporation’s behalf.”); *U.S. v. Omnicare, Inc.*, 2013 WL 3819671, *19 (N.D. Ill. 2013) (holding that “[a]ny cause of action and damages ... would belong to [the LLC], rather than any single member of the limited liability company”); *In re Heyl*, 502 B.R. 337, 342 (B.A.P. 8th Cir. 2013) (even though principal was a member of creditor, a limited liability company, he could not assert creditor’s interests on appeal).

bankruptcy, it is certain that the [owners] would not be so quick to request that we disregard the corporate form.”).

The only exception to this rule is for a “shareholder with a direct, personal interest in a cause of action,” *Franchise Tax Bd.*, 493 U.S. at 336, where that interest is “separate and distinct” from that of the corporation. *Gilardi v. U.S. Dept. of Health and Human Svcs.*, 733 F.3d 1208, 1216 (D.C. Cir. 2013) (shareholders of closely held corporation had standing to challenge contraceptive mandate of Patient Protection and Affordable Care Act because only they could assert a right to free exercise of religion), *vacated on other grounds*, *Gilardi v. U.S. Dept. of Health and Human Svcs.*, 134 S. Ct. 2902 (2014); *cf. Williams*, 901 F.2d at 164 (petitioners lacked standing as shareholders because their losses were derivative of an injury belonging to the corporation).

Kay has not demonstrated an injury separate and distinct from any suffered by Third District. Indeed, even though the FCC raised the issue of shareholder standing in its reply in support of its motion to dismiss, Kay has not even attempted to do so in his brief to this Court. As Kay points out, despite the revocation of previous licenses, he is not barred from owning new 800 MHz licenses in his own capacity. *See Kay Br.* 11-12. He thus could today hold licenses in his own name and could have done so at the time of the

Public Safety Order. Instead, Kay “chose to apply for the [800 MHz] license[s] through the corporate form of” Third District, securing the advantages that come with that form. *Williams*, 901 F.2d at 164. Because Kay has not demonstrated—or even alleged—an injury apart from any suffered by Third District, he has not carried his burden to show standing. This court therefore lacks jurisdiction and should dismiss Kay’s petition.

II. THE FCC’S DECISION TO MOVE INCUMBENT LICENSEES TO MAKE ROOM FOR THE PUBLIC SAFETY BAND IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Even if Kay had standing, his merits argument would fail. His sole claim is that the *Orders* are not supported by substantial evidence. Kay Br. 14-15. But the *Orders*, hundreds of pages long and based on years of proceedings and over 2200 comments, are amply supported.

A. The FCC supported its decision to relocate the public-safety NPSPAC band.

In the *Public Safety Order*, the FCC made key findings that Kay does not dispute. First, for “many of our Nation’s first responders[,] using the 800 MHz band for critical public safety communications . . . has become a linchpin in their ability to communicate effectively.” *Public Safety Order* ¶2 (JA __). Second, these users “encountered increasing amounts of interference from commercial mobile radio service...providers”—i.e.,

providers of both “traditional” cellular service and ESMR service from Nextel. *Id.* Third, this interference was “caused by a fundamentally incompatible mix of two types of communications systems”: “cellular architecture multi-cell systems—used by ESMR and cellular telephone licensees” on the one hand and “high-site noncellular systems” used by public safety users and business users like Third District on the other. *Id.*; *see also id.* ¶13 (JA __) (detailing findings of interference); *Public Safety NPRM* ¶¶14-16 (JA __-__). It concluded, based on these findings, that the interference problem needed to be remedied, *Public Safety Order* ¶¶2-3; 13 (JA __-__, __) and Kay does not challenge that conclusion.

To remedy this problem, the Commission concluded that “reconfiguring the 800 MHz band to separate these incompatible technologies...provides the best long-term solution to the problem of interference in the 800 MHz band.” *Public Safety Order* ¶142 (JA __). Accordingly, it moved the NPSPAC band to the bottom of the 800 MHz band. *Id.* ¶¶ 23, 151 (JA __). This new location would allow sufficient separation from the ESMR and cellular bands to significantly decrease interference. *Id.* ¶¶18, 22, 66 (JA __, __, __). In order to “accommodate [this] NPSPAC relocation,” “existing General Category systems” like Third

District's would "be relocated elsewhere in the 800 MHz band." *Id.* ¶23 (JA ____).

In making these changes, the FCC took great pains to reach an "equitable" solution that would "impose[] minimum disruption" on incumbents like Third District. *Id.* ¶2 (JA ____); *see also* ¶ 26 (JA ____)(agency was "sensitive to...concerns...about service and operational disruption and...committed to ensuring that...reconfiguration...does not result in degradation of existing service"). To this end, the Commission required Nextel to fund "the full cost of relocation of all 800 MHz band public safety systems and other 800 MHz band incumbents to their new spectrum assignments with comparable facilities." *Id.* ¶11 (JA ____); *see also Id.* ¶201 (JA ____) (incumbents "shall be relocated to comparable facilities...that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user").

This court has already found that other aspects of this scheme were "eminently reasonable." *Mobile Relay*, 457 F.3d at 10. So too here, the Commission fully supported its finding that it was necessary to "spectrally segregate public safety systems from ESMR and cellular telephone systems" that were causing interference, and that incumbent high-site users like Kay would need to be moved to accommodate this reshuffling. *Public Safety*

Order ¶22 (JA ___); *see also id.* ¶68 (JA ___) (license modifications required by the rebanding effort “are essential components of the most effective and equitable band restructuring plan required to resolve serious and heretofore intractable interference problems...that have impaired...public safety operations in the 800 MHz band”).

B. Kay was moved in order to make room for the public safety NPSPAC band, not because he was causing interference.

Kay argues that the *Public Safety Order* was nevertheless unsupported by substantial evidence because the record did not show that “traditional high site systems” like Third District’s “interfere with 800 MHz public safety operations.” Kay Br. 14. That is true, but irrelevant. The FCC never claimed that private high-site incumbents like Third District caused interference with public safety systems under the *old* scheme. Rather, it made clear that these incumbents occupied the space that would be dedicated solely to the public safety NPSPAC band under the *new* scheme, and so had to be moved to create space. *Public Safety Order* ¶23 (JA ___). And that finding, as explained above, was amply supported by substantial evidence.

Kay does not point to any proposal in the record that would have relocated the NPSPAC band without moving incumbents like Third District. He also does not allege that licensees like Third District could have simply

stayed in place, with the NPSPAC band moved “on top” of them. That would not have been feasible in any case. The NPSPAC band has different technical channel spacing requirements that are incompatible with other non-NPSPAC users. *NPSPAC Rules Order*, 3 FCC Rcd at 908, ¶22. Moreover, allowing incumbents like Third District to remain would take away spectrum from the full 6 MHz dedicated to public safety use in the NPSPAC band. The Commission long ago found that there was sufficient demand to justify setting aside 6 MHz for public safety use, *NPSPAC Allocation Order*, 2 FCC Rcd at 1838, ¶99, and Kay does not challenge that reasoning now.¹⁰

Kay mistakenly claims that the *Reconsideration Order* says that operations like his were causing interference (Kay Br. 15-16). In the language Kay cites, the agency rejected the premise of Kay’s argument that Nextel alone should be tasked with resolving all interference issues because Nextel was “the primary, if not sole, source of unresolved interference.” *Kay Reconsideration Petition* at 2 (JA ____). Instead, the Commission had found that “the record reflects that the interference problem...is highly complex and has not been ‘caused’ by any single party,” but rather was the result of

¹⁰ Indeed, Third District’s filings before the Commission conceded that its “current channel assignments are intended as replacement frequencies for fifteen different public safety jurisdictions.” *See November 2014 Third District Letter* at 2 (Supp. App. 2).

“systems with incompatible technologies operat[ing] in spectral proximity to one another.” *Reconsideration Order* ¶66 (JA ____). In stating this, the Commission was not asserting, as Kay now claims, that high-site users were causing interference to public safety systems, and so should be moved. Rather, the Commission was rejecting the assertion that Nextel alone should be held solely responsible for remedying this problem.

Kay is also mistaken that a solution which placed the onus entirely on Nextel could have been effective. The *Public Safety Order* repeatedly emphasized that non-ESMR cellular operations in the cellular A/B band then directly above the NPSPAC band were also a cause of unacceptable interference. *See Public Safety Order* ¶2 (JA ____) (interference “stems primarily from the operations of Nextel...as well as the operations of cellular telephone providers in the Cellular A and B bands); ¶115 (JA ____) (“unacceptable interference can originate from...ESMR, cellular telephone, or both); ¶300 (JA ____) (interference arose from “proximity” of “Nextel, cellular, [and] public safety”). Even if Nextel had ceased operations completely, as Kay seemed to urge, *see Kay Reconsideration Petition* at 4 (JA ____), without relocating the NPSPAC band away from the cellular A/B bands, serious interference could well have continued. *See Public Safety Order* ¶149 n.402 (rejecting a different proposal “because it would leave

NPSPAC systems immediately adjacent to cellular telephone A-band systems”) (JA ____). The agency therefore “continue[d] to believe that the only feasible means to protect public safety licensees from unacceptable interference” was “the spectral separation...in relocating public safety channels as far in frequency as possible from ESMR and cellular telephone operations.” *Reconsideration Order* ¶66 (JA ____).

Finally, Kay asserts that “[l]ess intrusive measures” “which required no mandatory frequency relocation of innocent high site licensees” were presented to the FCC. Kay Br. 16. But the agency “examined all proposals submitted in the course of this proceeding...and adopted a modified version of the only band plan that [would provide] an effective, comprehensive approach for resolving the interference problems that jeopardized public safety.” *Public Safety Order* ¶25 (JA ____). Indeed, the Commission made extensive findings that other approaches would be “both labor-intensive and expensive” and would in some instances address interference “poorly, if at all.” *Id.* ¶¶ 15-18 (JA____-____).

CONCLUSION

The Court should dismiss the petition for review for lack of jurisdiction. If the Court finds that Kay has standing, the petition should be denied.

Respectfully submitted,

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No. 06-1076

**IN THE UNITED STATES OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

JAMES A. KAY, JR.,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby
certify that the accompanying Brief for Respondents in the captioned case
contains 6,208 words.

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March 9, 2015

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

James A. Kay, Jr., Petitioner,

v.

**Federal Communications Commission
and the United States of America, Respondents.**

CERTIFICATE OF SERVICE

I, Matthew J. Dunne, hereby certify that on March 9, 2015, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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